

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

74-2557

B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. T-4036

VIVIEN KELLEMS, Petitioner

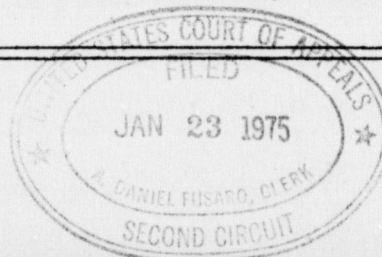
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Appeal for Review of Orders of Dismissal and
Decisions of the Tax Court of the United States

BRIEF FOR PETITIONER

Vivien Kellems, Pro Se
Newberry Road
East Haddam, Connecticut



IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. T-4036

VIVIEN KELLEMS, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Appeal for Review of Orders of Dismissal and
Decisions of the Tax Court of the United States

BRIEF FOR PETITIONER

ORDER OF DISMISSAL AND DECISION BELOW

There was no opinion below as hearing on the merits was denied. However, United States Tax Court Judge Wiles entered orders of dismissal and decisions on August 7, 1974.

JURISDICTION

This appeal involves judgment for deficiencies and penalties entered against petitioner without any hearing on the merits totalling \$106,791.18 for the years 1966 through 1971. Notices of appeal were duly filed on October 30, 1974. Jurisdiction

is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954, as amended.

QUESTION PRESENTED

At this stage petitioner is not pressing the constitutional issue involved, but is urging relief from the Tax Court's arbitrary refusal to grant her a hearing on the merits, either with or without a jury trial, in violation of the most elemental principles of due process of law. Therefore, the question presented is as follows:

Whether this Court should remand with instructions that the Tax Court grant petitioner a due process hearing on the merits?

STATUTE INVOLVED

The statute involved is Internal Revenue Code Section 7441, enacted as Section 961 of the Tax Reform Act of 1969, providing as follows:

"There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court."

STATEMENT OF FACTS

The cases below were set for trial before the Tax Court on July 25, 1974 at Washington, D.C. Prior thereto petitioner became gravely ill. However, by receiving a transfusion of blood

on July 23, 1974 she had sufficient strength to appear at the hearing to request a continuance for a few weeks in order that she could arrange for the proper preparation and trial of the cases.

In the course of making the above request, petitioner called the attention of the presiding Tax Court Judge to the unanimous decision of the Supreme Court in Pernell v. Southall Realty, 40 L.Ed.2d 198 (April 24, 1974). She pointed out that the Supreme Court had unanimously held that in the case of a constitutional court every litigant is entitled to a jury trial under the Seventh Amendment to the Constitution except in admiralty and equity cases. On the basis of the Supreme Court's opinion in Pernell v. Southall Realty, supra, petitioner requested a postponement for a reasonable period of approximately three weeks and that she be granted a trial on the merits with a jury if the Court agreed with her position as to the Supreme Court decision and without a jury if it disagreed with respect to the holding in Pernell v. Southall Realty, supra.

Petitioner's reliance on Pernell v. Southall Realty, supra, seemed to irritate, if not infuriate, the presiding Judge and he summarily granted respondent's motion to dismiss and entered judgment without any hearing whatsoever.

Petitioner respectfully submits that the Tax Court Judge's action in dismissing without giving her an opportunity for a due process hearing is carrying harassment too far even though pressure against her has been both obvious and blatant. For example, in the 1966-1967 case now on appeal to this Court, the deficiency notice disallows both the cost basis and the loss incurred upon the sale of a capital asset. The deficiency notice then adds the cost basis of the property sold to the loss and determines that the sum of the two constitutes taxable income!!!! It is respectfully submitted that a mistake of this nature and magnitude is not accidentally made by the Internal Revenue Service in the issuance of a final notice of deficiency.

The presiding Tax Court Judge was or should have been apprised as to the factual background making it imperative that petitioner be granted a full hearing in order that a grave miscarriage of justice might be avoided. The basic facts were set forth in "Memorandum in Opposition to Respondent's 'Motion For Further and Better Statement in Petition or to Strike in Part'", filed with the Tax Court on February 5, 1973 and now a part of the record on this appeal.

In the Tax Court's Memorandum Sur Order, Judge Wiles ignored the Supreme Court case of Pernell v. Southall Realty,

supra, completely and relied only on cases relating to a jury trial when the Tax Court was an administrative agency instead of a constitutional court.

The changed status of the Tax Court from an administrative agency to a constitutional court under the provisions of IRC Section 7441, enacted in 1969 and quoted above, is explained in Prentice-Hall Federal Tax Service at paragraph 38,926, as follows:

"The United States Tax Court (formerly the Tax Court of the U.S. and, before that, the Board of Tax Appeals) is now a court of record established under Article I of the U.S. Constitution. In general its powers and functions will continue as before, except that it has now the same powers as the District Court with regard to contempt, writs, orders, etc. Its members are known as the Chief Judge and the Judges of the Tax Court. Sec. 7441. Continuation of status is provided in Section 961 of the '69 Tax Reform Act.

"The Tax Court is not a mere reviewing Court. It may try cases de novo and render a decision on the evidence before it, rather than on a mere review of the record before the Commissioner."

To make it doubly clear that petitioner desperately desired a hearing on the merits even without a jury, she filed a motion with the Tax Court on September 4, 1974 reading as follows:

"MOTION TO (1) VACATE DECISION, (2) RECONSIDER
ORDER OF DISMISSAL, AND (3) GRANT HEARING ON
MERITS

"Comes now Vivien Kellems, pro se, and respectfully requests as follows:

"(1) That the decision entered in the above-entitled proceeding under date of August 7, 1974, determining deficiencies for the years 1966 and 1967 in the respective amounts of \$5,782.11 and \$6,507.95 be vacated,

"(2) That order of dismissal without hearing on the merits entered on August 7, 1974 be reconsidered and reversed, and

"(3) That petitioner be granted a hearing on the merits with or without a jury trial, as the Court deems proper, at any time on or after Monday, October 14, 1974.

"The grounds for this request are that petitioner has been gravely ill and was able to appear at the hearing of July 25, 1974 at Washington, D.C. only by having a blood transfusion earlier that week. Because of such illness petitioner had not been able to subpoena witnesses and assemble the proof necessary for the proper presentation of this case. Petitioner is now undergoing intensive treatment and it is believed that by October 14, 1974 she will be able to prepare and present this case to the Tax Court at a hearing on the merits.

"Petitioner recognizes that her request for a jury trial pursuant to the Constitution of the United States in the light of the Supreme Court's decision of April 24, 1974 in Pernell v. Southall Realty, 40 L.Ed.2d. 198, has been denied and she is not renewing that request at this time. However, in order that a serious miscarriage of justice in this case may be avoided, petitioner earnestly asks that she be granted a hearing on the merits before this Court on or after October 14, 1974, just as though the Supreme Court had not spoken in Pernell v. Southall Realty, supra."

The above motion was denied by Tax Court Judge Wiles on September 9, 1974. At the same time an identical motion was denied by Judge Wiles in each of the cases on appeal to this Court. Consequently, petitioner is now in this Court earnestly requesting that the cases be remanded to the Tax Court for a full hearing.

CONCLUSION

The instant cases should be remanded to the Tax Court for a due process hearing.

Respectfully submitted,

Vivien Kellems

Vivien Kellems, Pro Se
Newberry Road
East Haddam, Connecticut 06423